Supreme Court, U.S.
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NO._____

In The

Supreme Court of the United States

In Re Carl L. Jimena
Petitioner

On Petition for Writ of Mandamus To
Court of Appeals for the Ninth Circuit
(San Francisco, California Division)

PETITION FOR WRIT OF MANDAMUS

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I. QUESTIONS PRESENTED

1 Whether this Court has jurisdiction to issue a writ of mandamus, directed to the Court of Appeals, on the basis that it has failed to perform its duty in declining to allow an appeal from the Order of the U.S. District Court, Eastern District Court of California, Fresno Division. denying petitioner's motion to remand his case to the Superior Court of California joined with an appeal granting dismissal with leave to amend which became final.,

2. Whether the Court of Appeals failed to perform its duty in declining to allow an appeal from the Order of the above District Court denying petitioners appeal from the District Court's Order denying his motion to remand .his case to the Superior Court of California joined with an appeal on an order granting dismissal with leave to amend which became final.,

3. Whether this Court should exercise its discretion to issue a writ of mandamus to the Court of Appeals.

4. Whether this Court in its discretion has jurisdiction to order this case remanded to the California Superior Court and exercise its discretion to that effect.

II. PARTIES

Petitioner - Carl L. Jimena, in propia persona. Plaintiff in the District Court.
Appellant in the Court of Appeals. Beneficiary of the fund transfer from Nigeria (Standard Trust Bank) thru the intermediary bank (UBS AG in Switzerland) to Washington Mutual Bank in California. (latter bank is a non-party to this case)

Respondents -

(1) Court of Appeals for Ninth Circuit, San Francisco, California Division,
Panel of Justices whose orders are subject of this case:: Hon. Harry Pregerson, Hon. M. Margaret Mckeon, Hon. N.R. Smith
Address: 95 Seventh Street, San Francisco, CA 94103;
Tel. No. 415-355-8000

(2) U.S. District Court for the Eastern District of California, whose orders are subject of appeal: Hon. Oliver W. Wanger, Presiding
Address: 2500 Tulare St., Court Room 3, Fresno, CA 93721; Tel. 559-499-5600

(3) Interested Parties: (a) UBS AG Bank Inc., Manhattan, New York Branch is a branch and agent of (b) UBS AG Bank, Inc. of Zurich, Switzerland who/which is intermediary bank in the fund transfer. UBS AG abbreviation stands for Union Bank of Switzerland, "AG" means *aktiengesellschaft* a type of public-traded company in Switzerland and other German-speaking countries.

[Source, Wilkepedia]); a foreign corporation incorporated in Switzerland; both UBS AG Bank Inc., Manhattan, New York Branch and UBS AG Bank, Inc. of Zurich, Switzerland are collectively referred to as UBS AG in this case; (b) UBS Financial Services, Inc., Weehawken, New Jersey Branch (incorporated main branch and agents of UBS AG) (c) UBS Financial Services, Inc., Bakersfield, California Branch (agents of UBS AG); UBS FS is abbreviation for both the main branch and agent at Weehawken, New Jersey and the agent branch at Bakersfield, California; Clive Standish is a party who did not join removal Both UBS AG and UBS FS are represented by Atty. Jacob S. Kreilkamp of Munger, Tolles & Olson, 355 South Grand Ave. 35th Floor, Los Angeles, CA 90071-1560, Tel. No.213-683-9100, Fax No. 213-687-3702, email: Jacob Kreilkamp@info.com

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PETITION FOR WRIT OF MANDAMUS TO COURT OF APPEALS FOR THE NINTH CIRCUIT[1]

CARL L. JIMENA, petitioner in propia persona, petitions this Court to issue a writ of mandamus to respondent Court of Appeals, and shows as follows:

V. JURISDICTION

Jurisdiction to grant the writ of mandamus to the Court of Appeals, sought by petitioner, is conferred on this Court by the provisions of Section 1651(a), Title 28, Unites States Code, and Rule 20 of the Rules of Court. In this Court's discretion, jurisdiction to order remand of this case by the District Court to the California Superior Court is conferred by 28 U.S.C. §1447(c)

VI. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. §1651(a) – The "Supreme Court and all courts established by the Acts of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. §1447(c) "If at any time before final judgment it appears that the District Court lacks subject matter jurisdiction, the case shall be remanded."

28 U.S.C,. 1446(b)-The notice of removal of a civil action or proceeding shall be filed within thirty days

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[1] Please note: In the subsequent discussions "Doc.___" refers to District Court Docket Number and "CA9 Doc.____" refers to the 9th Circuit Court of Appeals Docket Number.

after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;
(2) citizens of a State and citizens or subjects of a foreign state;
(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and xxxx

(c) For the purposes of this section and section 1441 of this title—
(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that xxxx

VII. STATEMENT OF THE CASE

1. This petition is filed pursuant to the authority to issue extraordinary writs vested in this Court by the provisions of Section 1651(a), Title 28, United States Code and Rule 20 of the Rules of this Court, to review the order (Appendix, p.2-3) of the Unites

States Court of Appeals for the Ninth Circuit entered on September 11, 2008 declining to allow an appeal from the order of the District Court (Doc. 126, Appendix , p.26-34) entered on July 15, 2008 denying the motion to remand this case to the Superior Court of California joined with the appeal on the order dismissing UBS FS with leave to amend, (Doc. 18, Appendix , p.4-24) which had become final two times as discussed below. On December 8, 2008 the 9th Circuit likewise denied petitioner's motion for reconsideration (Appendix , p.3-4) from which date the 90 days period to petition this Court for the appropriate remedy begins to run.

2. Copies of the Court of Appeals orders referred to above are set forth in the Appendix to this petition, item nos. 1-3 thereof, and the District Court's orders, item nos. 4 and 6 thereof.

3. There are also included in the Appendix excerpts for which petitioner request permission to do so where there is only one point to be shown to this , Court, particularly items 5, 7, 9, 11 of the Appendix Table of Contents.[2] In particular, Petitioner beg permission to attach an excerpt of Docket No. 15, page 7,(item no. 9, Appendix hereof, with corrections to conform to the record) filed with the District Court just to show that petitioner invoked before that Court the case of Johnson & Johnson v. Superior Court, (1985) 38 Cal. 3d 243, 250 interpreting §415.40, California Code of Civil Procedure that service of amended summons and complaint is complete on the date of mailing which is

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[2] Petitioner request permission to add more documents in a joint appendix should it be found more documents are needed as this case has voluminous record.

binding on the District Court (Erie Doctrine) but ignored/rejected by the District Court in this case.

4. On July 28, 2008 before the District Court, petitioner filed a notice of appeal (Doc. 133, Appendix. pp. 35-37) principally directed to Doc. 126, (Appendix, pp.26-34) order denying motion to remand joined with an appeal on Doc. 18, (Appendix , p.4-24) stating "Defendants' motion to dismiss UBS FS from the complaint is GRANTED WITH LEAVE TO AMEND" which became final twice: First, when petitioner made an election to stand in his complaint informing the Court that he will not amend his complaint (Appendix, p.40) and Second, when the District Court clearly stated that UBS FS is out of this case (Appendix, pp.34-35, p. 25). In view of the fact that review on the aforesaid two orders is *de novo,* petitioner joined in his notice of appeal the other orders which was denied certification. The intent of petitioner that the basic appeal is on the order Doc. 126 (Appendix, pp.26-34 joined with Doc. 18 (Appendix, pp.4-24) is manifested in the notice of appeal petitioner stating that Docket 18 is now a final order (Appendix, p. 35-36) (and in the statement of the issues attached to the Appeal Docketing Statement, a copy attached as Annex 1 to petitioner's motion for reconsideration,, CA9 Doc.5 filed 9/15/2008) On September 11, 2008 the 9th Circuit dismissed petitioner's appeal (CA9 Doc.4, filed on September 11, 2008, Appendix , pp. 2-3) on the ground that the Order Doc. 126, Appendix , pp.26-34) denying remand joined with the Order Doc. 18 (Appendix , p.4-24) dismissing UBS FS with leave to amend are not final orders. On December 8, 2008, the 9th Circuit denied petitioner's motion for reconsideration (CA9 Doc. 6, Appendix , pp.3-4). Hence, the filing of the instant petition for writ of

mandamus because petitioner has a clear right to the appeal.

VIII. REASONS RELIED ON FOR ALLOWANCE OF THE WRITS

1. The relief sought is available, and there is an adequate remedy, by way of appeal to the Court of Appeals for the Ninth Circuit, and writ of certiorari to this Court. However, the Court of Appeals has dismissed petitioner's appeal, claiming that it lacks jurisdiction to entertain the appeal. Petitioner, therefore, has no recourse to obtain review of the District Court's order other than by application for issuance by this Court of a writ of mandamus to the Court of Appeals to entertain petitioner's appeal and, in the event of an unfavorable decision, a subsequent application to this Court for writ of certiorari.

2. The issues involved in the present proceeding are of an exceptional character and of great public importance in that [explain importance and exceptional character of issues].(a) the Court of Appeals should accept the appeal because the jurisdiction of the District Court should be settled immediately in the beginning of the case, rather than at the end of the case to prevent litigants in removed actions unnecessary time and expense, hence for the sake of economy which therefore affects the public. As stated in Cellport Sys. v. Peiker Acoustic GmbH & Co. KG [2004, DC Colo 335 F Supp 2d 1131, 1133), "the question of where the action is to be litigated" should be settled "as early as possible in the litigation". and "Removal, especially after an action is well underway in state court, interferes with ordinary state judicial process." In the case of Alligator Co. v. La Chemise La Coste, 421

U.S. 937, 938 (1975), Justice White concurred by Justice Blackmun and Justice Powell, stated: "jurisdictional questions should be reviewed at the first available opportunity." The situation in the case of (Owen Eqpt. & Erection Co. v. Kroger, 437 U.S. 365, at page 365 where the parties have to litigate the question of diversity jurisdiction up to this Supreme Court only to result in the case being remanded back to the state court after the parties spent time and much expense. (b) In not accepting petitioner's appeal, the Court of Appeals is condoning District Court's usurping the power, authority and jurisdiction of the California Superior Court which is withering or harmful to the trust and confidence of the public in the District Court eroding the respect of the people in district courts. In the case of Trans. Penn Wax Corp. v. McCandless, 50 F.3d 217, 227 (3d Cir. 1995) the Court held that mandamus should issue when there is clear error of law approaching unauthorized exercise of judicial power. Also, this Supreme court held that the writ of mandamus will issue if there has been a usurpation of judicial power or clear abuse of discretion. (Schlagenauf v. Holder, 379 U.S. 104, 110-111 (1964) cited by 16 Moore's Federal Practice 3d (2008 ed) §107.44[4] p. 107-267, note 67) The District Court in continuing to retain this case is usurping the power, authority, jurisdiction of the California Superior Court because notice of removal was untimely applying the interpretation of the California Supreme Court of §415.40, California Code of Civil Procedure in the case of Johnson & Johnson v. Superior Court, (1985) 38 Cal. 3d 243, 250, which is binding on the District Court . (West v. American Tel. & Tel. Co. 311 U.S. 223, 237 [1940] citing Erie Railroad Co. v. Tompkins, 304 U.S. 78 & Russell v. Todd, 309 U.S.

593; Doe v. Otte, 248 F.3d 832, 839 (9th Cir-2001;] to the effect that under the same §415.40 service is complete and effective on the date of mailing, not on tenth day after mailing service of summons and complaint. (This issue was raised before the District Court as shown in Appendix, pp. 37-38) Both UBS FS (UBS Financial Service, Inc., Weehawken, N.J. Main Headquarters ,agents of UBS AG) and UBS AG (Manhattan, New York Branch of UBS AG of Switzerland) were served with summons and amended complaint on January 31, 2007 by certified airmail. (Appendix, p. 9 citing proof of service on record with respect to UBS AG; Appendix p.11, statement of District Court with respect to UBS FS, which refers to proof of service attached to Doc. 8, Exh. C, Annex 3 in Appendix p. 42-44; all proof of service on all defendants are attached as exhibits in Doc. 8) Applying the ruling of the California Supreme Court in the above case of Johnson & Johnson v. Superior Court, supra, service was complete on January 31, 2007 from which time the 30 days period to file notice of removal under 28 U.S.C. §1446(b) is counted. Hence, the filing of notice of removal on March 6, 2007 (Doc. 1) was filed out of time. The District Court refused to follow the *West* case and *Erie* case. Further, the order granting the motion to dismiss of UBS FS with leave to amend became final when petitioner made an election on June 19, 2007 at the meet and confer session by all parties reported in Doc. 33, p. 2, Joint Scheduling Report (Appendix, p.40) where petitioner stated that he will not amend his complaint. With the election by petitioner to stand on his complaint the order granting UBS FS motion to dismiss with leave to

amend became final[3] pursuant to the decision of Edwards v. Marin Park, Inc., 356 F.3d 1058, 1065 (9th Cir - 2004) wherein the Court held:

> "Where however, the plaintiff makes an affirmative *choice* not to amend, and clearly communicates that choice to the court, there has been no disobedience to a court's order to amend; as *Yourish* itself noted, the plaintiff has the right to stand on the pleading *Yourish*, 191 F. 3d at 986 n.4. Hence we understand the *Ferdik-Yourish* rule to require a threatened Rule 12(b)(6) dismissal to ferment into a Rule 41(b) dismissal only upon a plaintiff's *inaction*.
> When the plaintiff timely responds with a formal notice of his intent not to amend, the threatened dismissal merely ripens into a final, appealable judgment. *See WMX Technologies*, 104 F. 3d at 1135.". (underlining mine)

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[3] In petitioner's first appeal (CA9 Case No.07-16220) from the order in Doc. 18, p. 18 stating "Defendants' motion to dismiss UBS FS from the complaint is GRANTED WITH LEAVE TO AMEND" the 9th Circuit dismissed the appeal on the ground that the order is not final and the order denying remand in the same order is also not final. (Appendix p. 1-2)However, the 9th Circucit lacked notice of the "Joint Scheduling Report" entered by UBS FS (UBS Financial Services, Inc.) in the Docket 33 as "notice" on the basis of which petitioner charged "fraud in the court", a subject discussed by petitioner"s in Doc. 93, p. 10, line 13-29, p. 11, line 1 to 19; then, in Doc. 107, beginning at p. 4, line 8 and ending on p. 5, line 5; next in Doc. 118, beginning p. 2, line 25, ending in p. 4, line 9, Doc. 33 reported that at the meet and confer on June 19, 2007, petitioner elected not to amend the complaint or stand on his complaint (Appendix, p.41) thus converting the dismissal with leave to amend into a final order under the ruling in the *Edwards* case quoted above. Hence, petitioners first appeal was mistakenly if not erroneously dismissed *sua ponte*.

. The 9th Circuit in its order dismissing the petitioner's appeal CA9 Case No. 08-16775 CA9 Doc. 4, 9th Circuit, Appendix, p. 2-3 cited the case of Chacon v. Babcock 640 F.2d 221, 222, (9th Cir. 1981)a case dealing with an appeal from partial summary judgment, applying it to this case in the dismissal of UBS FS with leave to amend. This was error because dismissal with leave to amend ripening into a final judgment/order as it is in this case calls for the application of Edwards v. Marin Park, Inc supra, and WMX Technologies case, supra that the ripened order/judgment is an appealable order. Since WMX Technologies, Inc. v. Miller, 104 F.3d 1123, 1135,(9th Cir. 1997) is an *en banc* decision it prevails over the case of Chacon v. Babcock, supra. However, even following the incorrect application by the 9th Circuit in this case of Chacon v. Babcock, supra., still the 9th Circuit is in error because when an order denying a motion to remand is joined with an order of partial summary judgment, the order denying the motion to remand is appealable as held in the case of Kruse v. Hawaii, 68 F.3d 331, 333 9th Cir 1995, [partial summary judgment at p 223, denial of order to remand at p.334, *Kruse case, supra.*](Kruse case cited at 16 Moore's Federal Practice 3d (2008), §107.44[1][b], note 17) Further, entry of judgment in favor of non-diverse defendants as it is in this case as the summary of facts below show that UBS FS is an alter ego and agent of UBS AG, permits review of an order denying remand. (B. Inc. v. Miller Brewing Co. 663 F.2d 545, 549-550 (5th Cir. 1981; cited by 16 Moore's Federal Practice 3d [2008 ed.] 107.44[1][b][ii] p/107-245, note 11) When the 9th Circuit Court injected into this case its interpretation of dismissal with leave to amend as a partial summary judgment, it added more confusion

on the issue of what rule to apply in a dismissal with leave to amend within the 9th circuit and among the eleven circuits; (c) settle expressly and clearly, not impliedly, the confusion and conflicts of rulings among the Circuit Courts on the issue of appealability of the order of dismissal with leave to amend. The conflict of opinion among circuits is recognized by the 9th Circuit Court when it said in WMX Technologies, Inc. v. Miller, 104 F.3d 1123, 1135,(9th Cir. 1997) as follows:

> "We recognize that the circuits have not been uniform in their approach to this issue. See (in circuit order) North Carolina Nat'l Bank v. Montilla, 600 F.2d 333, 334 (1st Cir. 1979(per curiam)(order dismissing an action with leave to amend is interlocutory); Richard's v. Dunne, 325 F.2d 155, 156 (1st Cir.1963) (per curiam) (after an order dismissing claim with leave to amend, another order of final dismissal is required); Festa v. Local 3 Int'l Bhd of Elec. Workers, 905 F.2d 35,37 (2d Cir.1990)(once deadline to amend has passed, the dismissal becomes final -- date of finality not specifically stated); Shapiro v. UJB Fin. Corp., 964 F.2d 272, 273 (3d Cir. 1992)(dismissal with leave to amend is not final, but can be made so if plaintiff specifically declares he will stand on his complaint)' Anastasiadis v. S.S. Little John, 339 F.2d 538, 539-40 (5th Cir. 1964)(a dismissal with leave to amend is not a final appealable order); Azar v. Conley, 480 F.2d 220,223 (6th Cir.1973) (a dismissal without prejudice to filing an amended complaint is not a final order where some amendment is possible); Otis v. City of Chicago, 29 F.3d 159, 1166-68 (7th Cir. 1994)(en banc)(finality springs into existence when the time for leave to amend expires--it is

better to adhere to the federal rules, but not necessary and court suspects that parties will become more attentive); Tietz v. Locl 10 of Int'l Ass'n of Bridge, Struct., & Ornamental Iron Workers 525 F.2d 688, 689 (8th Cir.1975) (per curiam) (dismissal with leave to amend is not a final appealable order); Landmark Land Co. v. Buchanan, 874 F.2d 717, 720 (10th Cir. 1989 (dismissal of complaint with leave to amend is not appealable); Shurman v. Motor Vessel Betty K.V,, 798 F.2d 442, 445 (11th Cir. 1986) (per curiam)(where time to amend is allowed, the order becomes final when that time expires)."

3. In support of paragraph 1 above, petitioner asserts that contrary to the order of the 9th Circuit Court of Appeals that it has no jurisdiction, it has in fact jurisdiction to accept petitioners appeal. "The Court [of Appeals] has jurisdiction over denial of a motion to remand to state court when coupled with an appeal of a final judgment." and need not wait for final judgment or certification (Leftall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 524 n. 1 (5th Cir. 1994; O'Halloran v. University of Washington, 856 F. 2d 1375, 1378-1379 [9th Cir 1988]; see 28 U.S.C.§1292(a)(1)[4]; see Alligator Co. v. La Chemise LaCoste, 421 U.S. 937, 938; 16 Moore's Federal Practice 3d (2008 ed.) §107.44[1][b][ii] p. 107-245) The latter rule applies to this case. On July 15, 2008, petitioners motion for remand in the District Court Doc. 103 was denied by its Order in Doc. 126. (Appendix, p. 26-34) On February 27, 2008, the District Court issued an order finally dismissing UBS Financial Services Inc. from this case stating "there is no basis for a default sanction or any

[4] Appeal is to compel remand, a mandatory injunction

sanction against UBS FS because it has been dismissed from and is no longer a party to this action" .(Doc. 101, p. 7, line 20-22; Appendix, p. 25)[5] and the other statement that "Unless and until Plaintiff's 'Motion to Set Aside Order Dismissing With Leave to Amend UBS FS and To Enter Default Against UBS FS', (Doc. 68), is resolved in Plaintiff's favor, UBS FS is not a party to this action." (Doc. 125, p. 17, line 20-26, Appendix , p. 34-35)[6] both prove the District Court's intention that the order dismissing UBS FS with leave to amend under Doc. 18, p.18 (Appendix , pp.23-24) is final and appealable.[7] Petitioner appealed both orders as

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[5] Petitioner request permission to annex an excerpt from the latter docket number as this is the only point to be shown. This appears on page 25 of the Appendix.

[6] Same request a s in footnote 3. 5 cf

[7] This is already a second appeal from the same order of the District Court in Doc. 18, p. 18, (Appendix , p. 24, 2-3). The 9th Circuit Court in CA9 Case No. 08-16775, subject of this mandamus, the 9th Circuit dismissed the appeal for lack of jurisdiction citing the case of Chaco v. Babcock 640 F.2d 221, 222 (9th cir 1981) a case dealing with an appeal from partial summary judgment, applying it to the dismissal with leave to amend in this case which had become final for the second time as pointed out above citing statements of the District Court. The Court of Appeals is clearly in error because dismissal with leave to amend ripens into a final order when the plaintiff informs the court that he will stand on his complaint (Edwards case), , or the court manifests in its order that it is final.(Ramirez case) A dismissal with leave to amend under the rulings of the 9th Circuit Court does not ripen into a partial summary judgment or is treated as partial summary judgment and none of the Circuit Courts does as seen from the WMX Technologies, Inc citation of how ot he Circuit Courts rule on the issue of dismissal with leave to amend. It was Justice Pregeson who laid down the rule that when a partial summary jugment is joined with denial of motion for remand, appeal is proper. ((Kruse v. Hawaii,68 F. 3d. 331, 334, cited by 16 Moore's Federal Practice

shown by the notice of appeal attached hereof in Appendix, p. 35-36.. Therefore, it is very clear that both orders Doc. 126 denying motion to remand coupled with an appeal on the order in Doc. 18, finally dismissing UBS FS, are both appealable. The case of Ramirez v. Fox Television Station, Inc., 998 F.2d 743, 747 (9th Cir 1993) squarely applies to this case. where there was a final dismissal order of the complaint (at p.747, *Ramirez* case) coupled with the denial of a motion to remand. (at p.747 *Ramirez* case. The 9th Circuit Court entertained the appeal. Similarly in the case of Lincoln Property Co. v. Roche 546 U.S. 81 in relation to Roche v. Lincoln Property Co. 373 F.3d 610 (4th Cir 2004), the 4th Circuit Court entertained the appeal since there was denial of motion to remand (at p.613. *Roche* case, supra), coupled with the final denial of motion for relief under Rule 60(b), Federal Rules of Civil Procedure (at p.613, *Roche* case, supra) and this Supreme Court granted certiorari in effect upholding the jurisdiction of the 4th Circuit to review *de novo* denial of motion to remand..

4. Alternatively, this Court may exercise its power and authority conferred by 28 U.S.C. §1447(c) to order remand by the District Court to the California Superior Court This Supreme Court exercised its jurisdiction in the case of International Protection League v. Administrators of Tulane Educational Fund, 500 U.S. 72, 73 (1991) where this Court held:

3d, (2008 ed.) §107.44[1][b], p. 107-247) To quote Justice Pregerson: "Kruse filed the instant appeal. She claims that the district court did not have jurisdiction because the action ws improperly removed." (at p. 331) "Here. the District Court's grant of partial summary judgment does not qualify as a decision on the merits under the Grubbs rule. Thus, we must ask whether removal was proper." (at p. 334)

"This case must be remanded to state court under the terms of 28 U.S.C. §1447(c) which declares that a removed case over which a district court lacks subject matter jurisdiction 'shall be remanded.' ." The compelling reasons to exercise this Court's discretion to that effect are (1) the disregard by the District Court to apply the interpretation of the California Supreme Court in Johnson & Johnson v. Superior Court, (1985) 38 Cal. 3d 243, 250,] of §415.40 that service of summons and complaint is complete on the date of mailing which is binding on the District Court . (West v. American Tel. & Tel. Co. 311 U.S. 223, 237 [1940]. (2) The lack of diversity jurisdiction because UBS Financial Services, Inc. (UBS FS, for short) is both an alter ego and agent of UBS AG, parent foreign corporation in which case, the citizenship of UBS AG is attributed to UBS FS as alter ego Danjaq ,S.A. v. Pathe Comme'ns Corp., 979 F.2d 772, 775 9th Cir. 1992)(15 Moore's Federal Practice 3d §102.56[7][b], p. 102-132.3[2007 ed.]). In the case of agency, UBS FS as agent of UBS AG had destroyed the presumption of separateness of the two corporations resulting in no diversity. (S & Davis International, Inc. v. Yemen, The Republic of Ministry of Supply and Trade 218 F.3d 1292, 1298 (11th Cir 2000);Doe v. Unocal Corp., 248 F.3d 915, 927-928 (9th Cir. 2001); Chan v.Society Expeditions, Inc. 39 F. 3d 1398, 1405 (9th Cir. 1994)

5. The Standard on Alter Ego Theory.

The 9th Circuit Court in the case of Doe v. Unocal Corp., 248 F.3d 915, 927-928 laid down the rule that when the subsidiary is being used as a "marketing conduit" this already satisfies the alter ego theory. To quote:

"To demonstrate that the parent and subsidiary are 'not really separate entities' and satisfy the alter ego exception to the general rule that a subsidiary and the parent are separate entities, the plaintiff must make out a prima facie case' (1) that there is such unity of interest and ownership that the separate personalities [of the two entities] no longer exist and (2) that failure to disregard [their separate identities] would result in fraud or injustice.' American Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 591 (9th Cir. 1996) xxxx

For example, where a parent corporation uses its subsidiary 'as a marketing conduit and attempts to shield itself from liability based on its subsidiaries' activities, piercing the corporate veil is appropriate and the alter-ego test is satisfied. Cf. United States v. Toyota Motor Corp. 561 F. Supp. 354, 359 (C.D. Cal. 1983)[8]

"The only recognized exception to the treatment of parent and subsidiary corporation as separate is if the subsidiary is deemed to be the alter ego of the parent corporation. In such a case, courts may view the formal separateness between the two corporations as merely a legal fiction and attribute the citizenship of the parent corporation to the subsidiary>"[31] (The latter footnote 31 cites the case of Danjaq ,S.A. v. Pathe Comme'ns Corp., 979

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[8] Cottie v. Walmart, 504 F.Sup. 2d 939, 944 (S.D. Cal. 2007) ruled: "Under California Law, alter ego test is satisfied where a parent corporation uses its subsidiary as a marketing conduit and attempts to shield itself from liability or where the record indicates that the parent dictates every facet of the subsidiary's business from broad policy decisions to routine matters of day to day operation."

F.2d 772, 775 9th Cir. 1992)[9](15 Moore's Federal Practice 3d §102.56[7][b], p. 102-132.3[2007 ed.])
"Marketing conduit" in relation to jurisdiction was defined in the same case of United States v. Toyota Motor Corp., supra, as follows:

> "The forum state does not exceed its powers under Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum. (World-Wide Volkswagen Corp. v. Woodson 444 U.S. 286, 297-298 [1980])"

6. Summary of Facts that UBS FS is an alter ego of UBS AG: UBS FS is a 100% or wholly owned entity of UBS AG. (Appendix, p.8-9) Both UBS AG and UBS FS are represented in this case by one law firm.

The facts in this case showing that UBS FS is a "marketing conduit" of UBS AG can be first read in Annex 3, amended complaint, (Appendix, p.42) second to the last paragraph (an integral part of the amended complaint, Rule 10(c), Fed. R. of Civ. P) to quote: "Wealth Management services in the United states are provided by UBS Financial Services, Inc., a registered broker/dealer offering securities, trading, brokerage and related products and services." This function is confirmed by the sworn Declaration of Jay Ericsson, Manager that "The Bakersfield Office consists of five licensed brokers and a support staff. "([Sworn] Declaration of Jay B. Ericsson attached to Doc. 11, District Court. Appendix, p.41, par. 3) The same function is distributed to all branches i. the U.S. as confirmed by the Sworn Declaration of Tambra King, secretary

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[9][9][9] Based on 28 U.S.C. 1332(c)(1) and 1332(a)2

officer of UBS FS Inc. stating that "UBS FS currently maintains approximately 550 branch office locations" throughout the United States. (Sworn Dec. of Tambra King attached to Doc. 11,. cited by the District Court in Doc. 18, p. 5, line 12-13, Appendix, p. 9) Taking the Bakersfield Branch as an example with five stockbrokers multiplied by 550 branch offices in the U.S. would give 2,750 employees. This gives an idea of the extensiveness of the marketing strength of UBS FS doing "wealth management" and as ".registered broker/dealer offering securities, trading, brokerage, and related products and services" throughout the U.S. The above discussion shows the intensiveness and extensiveness of the marketing strength of UBS FS in delivering the products of UBS AG into the stream of commerce in the entire U.S. with the expectation that they will be purchased by consumers, more particularly in the forum. (World-Wide Volkswagen Corp. v. Woodson 444 U.S. 286, 297-298 [1980]; United States v. Toyota Motor Corp. 561 F. Supp. 354, 359 (C.D. Cal. 1983)

Control of UBS FS Inc. and its 550 branches comes from the executive staff and board of directors from Switzerland (see amended complaint, p. 6, line 15-18; p. 11, line 16-19 cited in Doc. 18, p. 5, Appendix; p. 8) see also in Annex 1, 3 amended complaint), Appendix p. 39.

7. Conclusion on alter ego. From the summary of facts detailed above, the conclusion is inescapable that UBS FS is a "marketing conduit" of UBS AG, satisfying the alter ego doctrine as laid down by the 9th Circuit Court in Doe v. Unocal Corp., 248 F.3d 915, 927-928, (9th Cir. 2001) supra, citing U.S. v. Toyota Motor Corp., supra, World-Wide Volkswagen Corp. v. Woodson 444 U.S. 286, 297-298 (1980). The

fact that UBS FS is a wholly owned entity of UBS AG, plus the fact that both UBS FS and UBS AG are represented in this case by one law firm are added proof that UBS FS is an alter ego of UBS AG. (O'Donnell v. Weintraub, 67 Cal. Rptr. 274, 278, [2nd Dist 1968]) Hence, the citizenship of UBS AG is attributed to UBS FS following the case of Danjaq ,S.A. v. Pathe Comme'ns Corp., 979 F.2d 772, 775 9th Cir. 1992), supra. There is therefore no diversity of citizenship in this case.

8. The Standard in Agency Theory.

The case of Doe v. Unocal Corp., 248 F.3d 915, 927-928 reiterated the standard for the agency theory test as follows:

"The agency test is satisfied by a showing that the subsidiary functions as the parent corporations representative in that it performs services that are 'sufficiently important to the foreign corporation that if did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.' " Chan v. Society Expeditions, Inc. 39 F. 3d 1398, 1405 (9th Cir. 1994), quoting Wells Fargo, 556 F.2d at 423)" Doe v. Unocal, supra,

The same standard set by Doe v. Unocal, supra, was stated in a more brief style by S & Davis International, Inc. v. Yemen, The Republic of Ministry of Supply and Trade 218 F.3d 1292, 1298 (11th Cir 2000) holding that-

"The presumption of separate legal status may be overcome in two ways: (1) 'where a corporate entity is extensively controlled by its owner that the relationship of principal and agent is created (citation omitted) (2) where recognition of the instrumentality as an entity separate from the state [here UBS AG parent corporation] and UBS FS

subsidiary] would work fraud or injustice... (citation omitted)"

Both standards the *Doe* case and the *S & Davis International, Inc.* case accomplishes the same objective which is the creation of principal and agent relationship destroying the presumption of separateness of the two corporations resulting in no diversity. (S & Davis International, Inc. v. Yemen, The Republic of Ministry of Supply and Trade, supra; Gallagher v. Mazda Motor of America, Inc. (781 F. Supp. 1079,1084, [E.D. Pa., 1992];)

Summary of facts showing UBS FS is an agent of UBS AG. As found by the Lower Court:

"UBS AG Bank Inc. owns, operates and controls all named branches and is the parent company of UBS AG Bank, Manhattan Branch, 2. UBS FS Inc., Weehawken, Branch, and 3. UBS FS Inc., Bakersfield Branch.

UBS FS has approximately 550 branch offices throughout the United States. UBS FS Inc., Bakersfield Office is one such branch office." (Doc. 18, p. 5, line 7-14, Appendix , p. 8-9; p. 39)

The amended complaint, Doc. 1, page 6, line 16 and 17, Excerpt in Appendix p. 39) alleges that UBS FS Bakersfield Branch is doing business in behalf of UBS AG parent in Switzerland (stated by the District Court in Appendix, p. 9) which is proven, and admitted by both UBS FS and UBS AG, that the former is a "registered broker" of UBS AG in Annex 3 of the amended complaint, Doc. 1 (an integral part of the amended complaint, Rule 10(c), Fed. R. of Civ. P.), second to the last paragraph thereof. (Appendix p. 42)

UBS FS Inc. and its 550 branches as stated in Annex 3 of the amended complaint, second to the last paragraph (Appendix p. 42) are commissioned to

perform "wealth management" and is a "registered broker .... offering securities, trading, brokerage and related products and services." (underline mine)

That UBS FS branches are actually performing those duties is admitted and confirmed by the Manager of the UBS FS, Bakersfield Branch, Jay Ericcson stating that "The Bakersfield Office consists of five licensed brokers and a support staff." "([Sworn] Declaration of Jay B. Ericsson attached to Doc. 11, District Court, (Appendix, p. 41, par. 3) UBS FS currently maintains approximately 550 branch office locations" throughout the United States. (Sworn Dec. of Tambra King attached to Doc. 11, cited by District Court in Doc. 18, Appendix p. 9) Using the number of employees or agents of the UBS FS Branch in Bakersfield, California, a smaller city, which are five agents, multiplied by 550 branches in the U.S. gives a total of 2,750 employees agents. This is a conservative estimate considering there are many larger branches in major cities in the U.S.

Control of UBS FS Inc. and its 550 branches comes from the executive staff and board of directors from Switzerland Amended complaint alleges "liability of the head office UBS AG is a liability of all its branches being part of the same corporation".(see amended complaint, p. 6, line 15-18; p. 11, line 16-19; [Annex 1, 3 amended complaint; Appendix p. 8-9 cited by District Court in Doc. 18); Appendix p. 39)

The summary of facts of agency detailed above proves that UBS FS Inc. is an agent of UBS AG overcoming the separateness of the two corporations. One outstanding fact is the allegation of the amended complaint, page 6, line 16 and 17 alleging that UBS FS Bakersfield Branch is doing business in behalf of UBS AG parent in Switzerland.(as stated

by the District Court in Appendix, p. 9; also Appendix p. 39) taken in relation with Annex 3 of the amended complaint,(Appendix, p. 42 (remarked as Exhibit 3) particularly second to the last paragraph stating that UBS FS is a "registered broker" of UBS AG of Switzerland proves that UBS FS Bakersfield Branch and all UBS FS branches are agents of UBS AG parent corporation in Switzerland which is enough to overcome the presumption of separateness of UBS AG and UBS FS.

Another outstanding fact is the allegation of the amended complaint on page 5, line 8 that UBS AG "owns, operates, controls all above-named branches" (stated in Doc. 18, Appendix p. 8-9; p. 39) (referring to UBS FS; more so if all the facts on the summary of facts of agency above are added together) taken together with UBS AG's advertisement in the second to the last paragraph of Annex 3, amended complaint or Exh. 3, that "UBS Financial Services, Inc., a registered dealer/broker offering securities, trading, brokerage and related product's and services" satisfy the agency test because it is a showing that "the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the parent corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services". Chan v. Society Expeditions, Inc., 39 F. 3d 1398, 1405 (9th Cir 1994) The latter rule as articulated in Gallagher v. Mazda Motor of America, Inc. 781 F. Supp 1079, 1084 [E.D. Pa., 1992]; states that if a subsidiary performs functions that the parent would otherwise have to perform, the subsidiary then functions as "merely the incorporated department of its parent." (781 F. Supp. at 1084) Further, "The "subsidiaries

presence [UBS FS] substitutes for the presence of the parent". [UBS AG] in the forum. (Doe v. Unocal Corp., supra, citing Bulova Watch Co. Inc. v. Hattori & Co. Ltd., 508 F. Supp. 1322, 1342 (E.D.N.Y. 1981)

Under the standard set by *S & Davis International Inc. v. Yemen,* supra, the admission in Annex 3 of amended complaint (also Exh. 3) that UBS FS is an agent, "broker/dealer" of UBS AG takes the place of the evidence of control. Recognition of UBS FS as a separate entity would work fraud or injustice because this would mean that UBS AG would escape liability for committing fraud within the jurisdiction of the forum and would work injustice because UBS AG could escape liability for the payment of the 19 million dollars subject of fund transfer and would also avoid liability for the $76,000 UBS AG took by fraud from the plaintiff-appellant.

Conclusion on Agency Theory: UBS FS as agent of its principal UBS AG had destroyed the presumption of separateness of the two corporations resulting in no diversity. (S & Davis International, Inc. v. Yemen, The Republic of Ministry of Supply and Trade 218 F.3d 1292, 1298 (11th Cir 2000) supra.

9. Defendant Clive Standish was served with summons and amended complaint on March 9, 2007 by email three successive times on two email addresses (Doc. 8, Exh. C, Annex 7 at a time when petitioner had no knowledge yet of the notice of removal. Nowhere in the record can it be found that Clive Standish signed the notice of removal. Service on him is valid since as pointed out above the notice of removal was void for having filed beyond 30 days. (28 U.S.C. 1446(b).Hence there was lack of unanimity among defendants to remove. All defendants must

remove under 28 U.S.C. §1446(b). [Chicago, Rock Island & Pac. Ry. v. Martin, 178 U.S. 245, 248; (1900)]

10. This petition complies with the four prerequisite for the grant of the writ of mandamus: (Rule 20 of this Court) (1) In aid of this Court's appellate jurisdiction. This is pointed out in paragraph 1, VIII above. In addition, included as part of in aid of appellate jurisdiction is the exercise by this Court of its supervisory control over the federal court system (Marbury v. Madison,5 U.S. (1 Cranch) 137, 147 [1803]; cited by 23 Moore's Federal Practice 3d [2008 ed] §520.02[3] p.520-8) particularly in this case the right of superintending the inferior courts such as the Court of Appeals (9th Circuit) in dismissing twice petitioner's appeal without reasonable grounds as discussed above and superintending the District Court in vehemently refusing to remand this case to the California Superior Court without valid reasons as pointed out above. (2) exceptional circumstances warrant the exercise of this Court's discretionary powers as discussed in paragraph VIII, 2, (a) to (c) above. (3) adequate relief cannot be had in any form as discussed in paragraph VIII, 1, above (4) adequate relief cannot be had from any other court from the dismissal of the appeal by the Court of Appeals. This is also pointed out in paragraph VIII, 1, above.

IX. CONCLUSION

WHEREFORE, petitioner prays that this Court issue a writ of mandamus to the Ninth Circuit Court of Appeals, San Francisco, California Division, directing it to entertain and decide petitioner's appeal or direct the District Court for the Eastern

District Court of California to remand this case to the California Superior Court.

Petitioner further prays that this Court grant petitioner such other and further relief as it may deem to be just and equitable.

(Endnote: There will be no chance that funds collected in this case - not even a penny - will go to terrorists because under the plan of distribution, Exhibit 68, (see attached to Appellant's Affidavit in Doc. 49) the Religious Leader who has the choice of the construction company will ask law enforcement agencies to run a security check on the construction company to clear it from terrorist connection before the contract is entered. Petitioner is responsible for full accounting of the funds which will prove not a penny went to any terrorist. No fear of terrorist or drug connection because Nigeria was delisted on June 23, 2006 from the list of non-cooperative countries in the law enforcement against drugs and terrorism by the Financial Action Task Force [FATF]. (Annex 9, 9A, Exh. 48 and 67, attached to petitioner's Affidavit, Doc. 49; (Documents cited in this endnote are not included in the Appendix because they are not in issue in this petition) Meanwhile, UBS AG has no reason to hold fund transfer from May 5, 2006 to the present (a period of over 2.5 years, a fund transfer that should be over in 96 hours) without committing repeated constructive fraud on day to day basis constituting recidivism entitling petitioner to triple punitive damages and triple legal rate of interest. (State Farm Mutual Auto

Insurance v. Campbell, 538 U.S. 430, 438 [2003] California Civil Code §3289(b) in relation to §3288 of the same Code)

Respectfully submitted,

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North Edwards, California 93523

2-23-07

APPENDIX

No._____
IN THE
SUPREME COURT OF THE UNITED STATES
In Re: CARL L. JIME NA
Petitioner

On Petition for Writ of Mandamus To
The Court of Appeals For The Ninth Circuit
(San Francisco, California Division)

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1. CA9Case: 07-16220, Order dismissing appeal (first appeal)
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FILED Aug 24, 2007.
UNITED STATES COURT OF APPEALS
MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL L. JIMENA,
Plaintiff - Appellant,
No. 07-16220
D.C. No. 1:07-cv-00367-OWW
V. Eastern District of California,
Fresno

UBS AG BANK, INC, Switzerland
Headquarters; et al.,
Defendants Appellees.

ORDER

Before: RYMER, M. SMITH, AND N.R. SMITH, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. See WMX Techs. Inc;. v. Miller, 104 F.3d 1133 (9th Cir. 1997)(dismissal of complaint with leave to amend is not appealable); see also Bishop v. Bechtel Power Corp. (Estate of Bishop, 905 F.2d 1272, 1274 (9th Cir. 1990) (denial of motion to remand is not a final or appealable order under 28 U.S.C. §1291).

Consequently, this appeal is dismissed for lack of jurisdiction.

2. Case: 08-16775, Order dismissing appeal
Case: 08-16775 09/11/2008 Page: 1 of 1 DktEntry: 6642708

FILED SEP 11 2008
UNITED STATES COURT OF APPEALS
MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL L. JIMENA,
Plaintiff - Appellant,
No. 08-16775
D.C. No. 1:07-cv-00367-OWW
v. Eastern District of California,
Fresno

CLIVE STANDISH; et al.,
Defendants - Appellees.

ORDER

Before: PREGERSON, McKEOWN and N.R. SMITH, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable. See 28 U.S.C. § 1291; Chacon v. Babcock, 640 F.2d 221, 222 (9th Cir. 1981) (order is not appealable unless it disposes of all claims as to all

parties). Consequently, this appeal is dismissed for lack of jurisdiction.

All pending motions are denied as moot.

MF/Pro Se

3.CA9 Case: 08-16775, Order denying motion for reconsideration of order dismissing appeal (second appeal)

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FILED DEC. 8, 2008
UNITED STATES COURT OF APPEALS
MOLLY C. DWYER, CLERK

U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL L. JIMENA,
Plaintiff - Appellant,

No. 08-16775

D.C. No. 1:07-cv-00367-OWW

v. Eastern District of California,
Fresno

CLIVE STANDISH; et al.,
Defendants - Appellees.

ORDER

Before: PREGERSON, McKEOWN and N.R. SMITH, Circuit Judges.

Appellant's motion for reconsideration of the September 11, 2008 order dismissing this appeal for lack of jurisdiction is denied on behalf of the full

court. See Gen. Ord. 6.11. The orders challenged on the appeal are not final or appealable.

No motion for reconsideration, rehearing, modification, stay of the mandate or anhy other submissions shall be filed or entertained in theis closed docket.

4.Case 1:07-cv-00367, Dist. Court, Doc. 18, order denying motion to remand and granting UBS FS motion to dismiss with leave to amend.

Case 1:07-cv-00367-OWW-GSA Document 18 Filed 06/08/2007 Page 1 of 18

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CARL L. JIMENA,
Plaintiff,
v.

UBS AG BANK, INC., SWITZERLAND HEADQUARTERS; UBS AG BANK, INC., MANHATTAN, NEW YORK BRANCH; UBS FINANCIAL SERVICES, INC., BAKERSFIELD, CALIFORNIA BRANCH; AND UBS FINANCIAL SERVICES, INC. WEEHAWKEN, NEW JERSEY BRANCH; CLIVE STANDISH,
Defendants.

1:07-CV-00367 OWW TAG

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR REMAND AND MOTION TO STRIKE;GRANTING DEFENDANTS' MOTION TODISMISS WITH LEAVE TO AMEND

1. INTRODUCTION

This case was removed from The Superior Court of California, County of Kern. Jurisdiction in this matter is based on diversity of citizenship. Plaintiff claims to have been defrauded by individuals who sent him forged emails that falsely purported to come from an officer of Defendant UBS AG. Plaintiff now sues Defendants for fraud, violations of several state and federal commercial codes, and "intentional tort." Plaintiff seeks to remand this action be remanded. Defendants oppose and move to dismiss Plaintiff's claims against UBS Financial Services, Inc. ("UBS FS"), a Delaware Corporation for failure to state a claim.

Case 1:07-cv-00367-OWW-GSA Document 18 Filed 06/08/2007 Page 2 of 18

2. PROCEDURAL BACKGROUND

The case was removed to this court on March 6, 2007. (Doc. 1, Notice of Removal, Ex. 1, Complaint.) On March 13, 2007 Defendants filed a motion to dismiss the complaint against UBS FS for failure to state a claim. (Doc. 6, Motion to Dismiss.) On March 26, 2007, Plaintiff filed a motion to declare removal void which sounds like a motion to remand. (Doc. 8, Notice of Motion and Motion to Declare Notice of Removal Void.) Plaintiff filed an opposition to Defendants' motion to dismiss and a motion to strike on March 30, 2007. (Doc. 10, Opposition and Motion

to Strike.) On April 16, 2007 Defendants filed an opposition to Plaintiff's motion to remand. (Doc. 11, Opposition to Plaintiff's Motion for Remand.) On April 19, 2007 Defendants filed a reply to Plaintiff's opposition to their motion to dismiss. (Doc. 13, Reply of UBS in support of Motion to Dismiss.) On April 24, plaintiff filed his reply to Defendants' opposition to his motion for remand. (Doc. 14, Plaintiff's Reply.)

3. FACTUAL BACKGROUND

A. Background Facts

Plaintiff has apparently been defrauded in a variant on the emails that falsely purported to come frm an officer of UBS AG in Zurich, Switzerland. According to Plaintiff, he was contacted by an individual who ad set up n email account under the name clive_sandish@yahoo.com. This individual claimed to be Clive Standsh, the Chief Financial Officer of UBS AG. This impersonator apparently offered to transfer $19 million to

Plaintiff's bank account. Plaintiff was convinced to wire $51,000 via Washington Mutual Bank, Bank of New York, and UBS AG to an account at a fourth bank, HSBC, allegedly to satisfy a non existent "Anti Drug/Terrorist Clearance" fee required for transfers from Nigeria. Plaintiff never received the 19 million

that he expected. He has sued UBS AG and Clive Standish, Chief Financial Officer of UBS AG. Plaintiff brings a cause of action against all named defendants, including UBS FS, for

1. Fraud

2. California Commercial Code § 11302[1], and § 11103[2], UCC § 4A-302(a)(1)[3] , 301(b)[4] , §4A-103(a)(1)[5]

---

[1] Cal. U. Com. Code § 11302 regulates the obligations of receiving bank in executing payment order and does not provide for a cause of action in tort. Plaintiff does not provide any legal support or factual claims to support his cause of action under § 11302.

[2] Cal. U. Com. Code. § 11303 governs payment to receiving bank of amount of sender's order and recovery of excess payment from beneficiary. Section 11303(a) and (b) deal with cases in which the receiving bank executes payment by issuing a payment order in the wrong amount. When this happens, the Originator's bank is entitled to recover the overpayment from the Beneficiary to the extent allowed by the law governing mistake and restitution. Plaintiff has failed to show how § 11303 applies to this case.

[3] U.C.C. § 4A-302(a)(1) states: "The receiving bank is obliged to issue on the execution date, a payment order complying with the sender's instructions concerning (I) any intermediary bank or fund transfer system to be used in carrying out the funds transfer, or (ii) the means by which payment orders are to be transmitted in the funds transfer. If the originator's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank if the funds transfer is similarly bound by an instruction given to it y the sender of the payment order it accepts." Plaintiff fails to show how a p ivate right of action is created by this section.

[4] U.C.C. § 4A-301(b) states: "'Execution Date' of a payment order means the day on which th receiving bank may properly issue a payment order in execution of the sender's order. The execution d ate may be determined by instruction of the sender but

cannot be earlier than the day the order is received and, unless otherwise determined, is the day the order is received

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3. Intentional Tort

4 .Interest on damages

(Doc.1, Notice of Removal, Ex. 1 Complaint, filed March 6, 2007.)

B. UBS Financial Services

Defendant UBS AG is incorporated and has its principal place of business in Switzerland. (Doc.1, Notice of Removal, Ex. 1

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Complaint, p.¶1, filed March 6, 2007.) Defendant UBS Financial Services ("UBS FS") is a corporation that is wholly owned by an entity that is itself wholly owned by UBS AG. UBS FS is incorporated in

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Plaintiff fails to show how this ection creates a private cause o f action.

[5] U.C.C. § 4A-103(a)(1) is a section that provides Payment Order Definitions. It states: "'Payment Order' means an instruction of a sender to receiving bank, transmitted orally, electronically or in writing, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if (I) the instruction does not state a condition to payment to the beneficiary other than time of payment, (ii) the receiving bank is to be reimbursed by debiting an account of, or otherwise

receiving payment from, the sender, and (iii) the instruction is transmitted by the sender directly to the receiving bank or to an agent, funds-transfer system, or communication system from transmittal to the receiving bank." Plaintiff has failed to show

that this section establishes a private cause of action.

Delaware with its principal place of business at its headquarters in New Jersey. (Doc. 11, Declaration of Tambra King ("King Declaration"), ¶ 3, Filed April 16, 2007.)

UBS AG Bank Inc. owns, operates, and controls all named branches and is the parent company of 1. UBS AG Bank, Manhattan Branch 2. UBS FS Inc., Weehawken Branch and 3. UBS FS Inc., Bakersfield Branch. (Doc. 1-2, Notice of Removal, Exhibit A, Complaint, p. 5, Filed May 6, 2007.)

UBS FS, Inc. has approximately 550 branch offices throughout the United States. (Id. at ¶ 4.) UBS FS, Inc. Bakersfield office is one such branch office. Id. Plaintiff joins UBS FS, Inc. Bakersfield as a defendant to establish that the parent corporation UBS AG, Inc. is doing business in the Eastern District of California. Plaintiff further alleges that UBS AG, Inc. is liable for the acts of Clive Standish "even though he was acting for his own purpose."

C. Facts Regarding Service

Defendant claims that on January 31, 2007, Plaintiff caused copies of the summons and complaint to be mailed by certified mail in accordance with Cal. Code Civ. Proc. § 415.40, to the UBS AG New York. The summons was to "Pres./Gen. Mgr./Legal Dept." (Doc. 8, Plaintiff's Motion to Void Removal, Exhibit A, Annex 3.) Defendant also argues that on February 1, 2007, plaintiff caused "two copies: one for the branch...; one for UBS AG Bank Inc., Zurich Switzerland Headquarters" to be delivered to Jay Ericsson

("Ericsson"), a branch manager in UBS FS Bakersfield.[6] (Doc 8, Plaintiff's Motion to Void Removal, Exhibit A, Annex 3.)[7] Ericsson has stated in his declaration that he has never been authorized to act as UBS AG's agent for any purposes including service of process. (Doc. 11, Opposition, Declaration of Jay B Ericsson, ¶ 5, Filed April 16, 2007.) He is

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[6] According to Jay Ericsson's declaration, he manages a Bakersfield satellite office for UBS FS and reports to the manager of the Fresno Office, Robert Gunning. (Doc. 11, Opposition, Declaration of Jay B. Ericsson, ¶ 4, Filed April 16, 2007.) He states that his responsibilities and authority at UBS FS are of the Bakersfield satellite office. (Id., ¶ 4..) He states that he has no management responsibilities or authority with respect to any other office, or any other aspect of the business of UBS FS. From this it is evident he is not a general manager, nor an agent authorized to accept service of process.

[7] The third defendant in this lawsuit, individual defendant Clive Standish, a United Kingdom citizen and Swiss resident, has not been served and no attorney had made an appearance for him. Plaintiff appears to contend that he served Mr. Standish by sending an email to the Yahoo email address used by the impersonators who defrauded plaintiff by pretending to be Mr. Standish. California does not provide for service by email, and even if it did, such service could not have been effective as to the real Mr. Standish, a stranger to the Yahoo email address used by Plaintiff.

not a general manager nor does he hold any other status required by Cal. Code Civ. Proc. § 415.40.

Plaintiff claims that on February 1, 2007, Defendant UBS FS Bakersfield was served by personal delivery. According to Plaintiff, the registered agent for service of process of UBS FS, Corporation Service Company ("CSC"), had a PO Box address. The Superior Court for the County of Kern issued an order that a PO Box is not a valid address pursuant to Cal. Code Civ. Proc. §

415.50. (Doc. 8, Exhibit D.) To overcome the ruling of the Superior Court, Plaintiff made a third service on Defendant UBS FS Bakersfield by certified mail to the physical address. Defendant claims that it was not until February 5, 2007, that CSC received copies of the summons and complaint via certified mail. (Doc. 8, Plaintiff's Motion to Void Removal, Exhibit C, Annex 3.) According to Defendants, they filed and served their notice of removal on March 6, 2007, within 30 days after the delivery of summons and complaint to CSC.

Plaintiff also served other branches of UBS AG. Defendant UBS FS Weehawken, New Jersey signed the return receipt with no date of the certified mailing to it of the summons and amended complaint on January 31, 2007. Defendant UBS AG Manhattan signed on February 2, 2007 the return receipt of the certified mailing to it of the summons and amended complaint.

On March 6, 2007 Defendants filed a notice of removal to the US District Court, Eastern District of

California Fresno Division from the Superior Court for Kern County and this case is now pending before the US District Court.

4. PLAINTIFF'S MOTION FOR REMAND

A. Standard of Review

Section 1447(c) provides that "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. 1447(c); Briano v. Conseco Life Ins. Co., 126 F. Supp. 2d 1293, 1295 (C.D. Cal 2000). The subject matter jurisdiction of the district court is not a waivable matter and may be raised at anytime by one of the parties, by motion, or in the responsive pleadings. Id. A

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defendant has the burden of establishing that removal was proper. Arellano v. Home Depot U.S.A., Inc., 245 F. Supp. 2d 1102, 1105 (S.D. Cal 2003); Duncan, 76 F.3d at 1485. The removal statute is to be strictly construed against removal. Abrego v. Dow Chem. Co., 443 F.3d 676, 685 (9th Cir. 2006). Federal jurisdiction must be rejected if there is any doubt as to the right or removal in the first instance. Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996). Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case Santos v. People of Guam, 436 F.3d 1051, 1053 (9th Cir. 2006).

B. Timeliness of Removal

A civil action filed in state court that might have been brought originally in federal court may be removed by "the defendant or defendants." 28 U.S.C. § 1441. Section 1441(b) provides a time limit for removal, providing that "the notice of removal... shall be filed within thirty days after the receipt by the defendant... of a copy of the initial pleading." 28 U.S.C. § 1447(b). Removal is affected by filing and serving the notice of removal. see, 28 U.S.C. § 1446.

Service upon a domestic or foreign corporation... that is subject to suit under a common name may be served: 1. pursuant to the law of the state in which the district court is located or of the state in which service is effected or 2. pursuant to federal law. Fed. R. Civ. P. 4(h).

Under the Federal Rules, a business entity may be served by delivering a copy of the summons and complaint to: 1. an officer;

2. a managing or general agent, 3. any other agent authorized by appointment or by law to receive service of process. Fed. R. Civ. P. 4(h)(1). Under California law a corporation may be served by delivering copies of the summons and complaint to

1. the president "or other head of the corporation," a vice-president, secretary or assistant secretary, a treasurer or assistant treasurer, general manager or other persons authorized by the corporation to receive service of process; or 2. the person designated by the corporation as its statutory agent for service;

or 3. the Secretary of State. Cal. Code Civ. P. § 416.10.

The term general manager of a corporation indicates one who has general direction and control of the business of the corporation as distinguished from one who has the management only of a particular branch of the business; he may do everything which the corporation could do in transaction of its business. General Motors Corp. v. Superior Court, 15 Cal. App. 3d 81, 86 (Cal. Ct. App. 1971); see also, Gibble v. Car-Lene Research, 67 Cal. App. 4th 295, 313 (Cal. Ct. App. 1998.)(A "general manager" includes any agent of the corporation of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made.) Here, a local branch manager of one of hundreds of branch offices is not a general manager.

Plaintiff argues that Defendants notice of removal was untimely because it was filed beyond the 30 day period of time as required by 28 U.S.C. 1446(b). "A sole defendant who fails to

remove within thirty days of service waives the right of removal." Smith v. Mail Boxes Etc., Inc., 191 F.Supp. 2d 1155 1158 (E.D. Cal. 2002). "The suit thus remains in state court or can be remanded if the removal violated the thirty day limit." Id.

i. UBS FS, Bakersfield

Plaintiff claims that he delivered the summons and complaint to Defendant UBS FS Bakersfield on

February 1, 2007 by personal delivery. Plaintiff argues that Defendant had until March 3, 2007 to remove the case. However, Plaintiff's service of UBS FS on February 1, 2007 was delivered to Ericsson who is the manager of the Bakersfield satellite office. Ericsson stated in a sworn affidavit that he has never been authorized to act as UBS AG's agent for any purposes including service of process. Plaintiff has failed to provide facts to show that Ericsson's duties as manager of the Bakersfield satellite office include having "general direction and control of the business of the corporation as distinguished from one who has the management only of a particular branch of the business." He is not a general manager.

Further, Plaintiff did not serve CSC, Defendants' in state agent, until February 5, 2007. Defendants's last day to file a notice of removal was February 7, 2007. Defendants filed the notice on February 6, 2007 within the 30 day period of 28 U.S.C. 1446(b).

ii. UBS AG New York

Plaintiff also asserts that 1. UBS AG was served on February 1, 2007 when Plaintiff caused the summons and complaint to be served on the UBS FS branch manager, and 2. that UBS AG was

served on February 2, 2007 when its New York office received by certified mail a copy of the summons and complaint.

First, the service on February 1, 2007 to UBS FS Bakersfield and its office manager, Ericsson, was not sufficient under California law. It was not until the

proper February 5, 2007 delivery of the summons and complaint to the designated agent, CSC, that the 30 day clock began to run. However, even if the February 1 service was proper, it is well settled that "service on a subsidiary does not constitute service on a parent corporation even if the subsidiary is considered to be an alter-ego of the parent corporation." Graval v. P.T. Bakrie & Bros., 986 F. Supp. 1326, 1330 (C.D. Cal. 1996). Plaintiff could not have properly served UBS AG through his service of UBS FS.

Plaintiff mailed his service of process to UBS AG New York on January 31, 2007. Under Cal. Code. Civ. Proc. § 415.40 service is deemed complete ten days after mailing. In this case, service to UBS AG was complete on February 10, 2007. UBS AG's removal on March 6, 2007 was within the 30 day deadline. Plaintiff's motion to remand is DENIED.

C. Diversity

Plaintiff next argues that removal was improper because it destroys diversity jurisdiction. Jurisdiction in this case is based exclusively on diversity of citizenship. Original diversity jurisdiction exists under 28 U.S.C. § 1332(a) when the parties are of diverse citizenship and the amount in controversy exceeds $75,000.[8] A defendant may remove from state court any

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[8] It is undisputed that the amount in controversy is $19 million.

action "of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). When an action is removed based on diversity, complete diversity must exist at removal. Gould v. Mutual Life Ins. Co. of New York, 790 F.2d 769, 773 (9th Cir. 1986), cert. denied, 479 U.S. 987, 107 S. Ct. 580 (1986). Complete diversity requires each plaintiff to be a citizen of a different state than each defendant. Caterpillar Inc. v. Lewis, 519 U.S. 61, 68 (1996); Morris v. Princess Cruises, Inc. 236 F.3d 1061, 1067 (9th Cir. 2001). Generally, diversity is determined from the face of a complaint. Gould, 790 F.2d at 773.

Plaintiff is a resident of Bakersfield, California. UBS AG is incorporated and has its principal place of business in Switzerland. UBS FS is incorporated in Delaware and has its principal place of business in Weehawken, New Jersey. (Doc. 11, King Declaration.) UBS FS Bakersfield is not a separate corporation. There is no such entity. UBS FS Bakersfield is one of many satellite locations at which the Delaware/New Jersey corporation UBS FS does business. Plaintiff's ignorance of the law does not make it otherwise. Removal in this action did not destroy diversity among the parties and was properly filed by Defendants.

5. DEFENDANT'S MOTION TO DISMISS

A. Standard of Review

Fed. R. Civ. P. 12(b)(6) provides that a motion to dismiss may be made if the plaintiff fails "to state a claim upon which

relief can be granted." However, motions to dismiss under Fed. R. Civ. P. 12(b)(6) are disfavored and rarely granted. The question before the court is not whether the plaintiff will ultimately prevail; rather, it is whether the plaintiff could prove any set of facts in support of his claim that would entitle him to relief. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). "A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Van Buskirk v.CNN, Inc., 284 F.3d 977, 980 (9th Cir. 2002) (citations omitted).

In deciding whether to grant a motion to dismiss, the court "accept[s] all factual allegations of the complaint as true and draw[s] all reasonable inferences" in the light most favorable to the nonmoving party. TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999); see also Rodriguez v. Panayiotou, 314 F.3d 979, 983 (9th Cir. 2002). A court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

B. Plaintiff Fails to State a Claim for Fraud

In California the elements of fraud are (1) a Misrepresentation (false representation, concealment, or non disclosure); (2) knowledge of falsity (or scienter); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage. Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 980 (Cal. 2004). Rule

9(b) requires that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to

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constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong. Celado Int'l, Ltd. v. Walt Disney Co., 347 F. Supp. 2d 846, 855 (C.D. Cal. 2004); see also Neubronner v. Milken, 6 F.3d 666, 671 (9th Cir. 1993)(internal quotations omitted). A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations. Neubronner, 6 F.3d at 671. The complaint must specify such facts as the times, dates, places and other details of the alleged fraudulent activity. Id. It is established law, in the Ninth Circuit and elsewhere, that Fed. R. Civ. P. 9(b)'s particularity requirement applies to state-law causes of action. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003) While a federal court will examine state law to determine whether the elements of fraud have been pled sufficiently to state a cause of action, the Rule 9(b) requirement that the circumstances of the fraud must be stated with particularity is a federally imposed rule. Id.

Plaintiff does not allege what specific conduct UBS FS engaged in that resulted in defrauding Plaintiff. Throughout his complaint Plaintiff makes general allegations that Defendants "falsely represent[ed] to Plaintiff by many promises that Defendants [would] electronically wire transfer the 19 million dollars at

a Washington Mutual Bank, California... within 24 hours after confirmed payment of $51,000 which was in fact false based on the fact that after payment of the $51,000 on June 14, 2006, defendant failed to electronically wire transfer the 19 million..." (Doc. 1-2, Notice of Removal, Exhibit A, Complaint,

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p. 18, Filed May 6, 2007.)

In his complaint Plaintiff specifically alleges that UBS AG and Clive Standish engaged in an email exchange with Plaintiff where they allegedly made misrepresentations promising Plaintiff $19 million after Plaintiff wired $51,000. (Id., p. 24.) However, no where in his complaint does Plaintiff specifically allege that UBS FS sent any of the emails or otherwise had anything to do with Plaintiff in this dispute. In his complaint, Plaintiff joins UBS FS, Bakersfield as defendant for "doing business in behalf of or together with its parent corporation UBS AG." However, Plaintiff cannot allege claims against UBS FS merely by asserting that they were at the time of the accused conduct corporate, affiliates, and subsidiaries of UBS AG. see TPS Utilicom Servs. v. AT&T Corp., 223 F. Supp. 2d 1089, 1103 (C.D. Cal. 2002).[9]

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[9] Plaintiff attempts to refute Defendants' argument byciting to Volkswagenwerk Aktiengesellshaft v. Schlunk, 486 U.S. 694 (1988). The Volkswagenwerk case involved an attempt to serve process on a foreign corporation by serving its domestic subsidiary that was deemed the

B. Plaintiff Fails to State a Claim for Intentional Infliction of Emotional Distress.

Plaintiff's third cause of action is for intentional tort. Based on Plaintiff's allegations, the claim sounds like a claim for intentional infliction of emotional distress. The elements

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of intentional infliction of emotional distress are: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct. Potter v. Firestone Tire & Rubber Co., 6 Cal. 4th 965, 1001 (Cal. 1993). Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. Id. The defendant must have engaged in conduct intended to inflict injury or engaged in with

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foreign corporation's involuntary agent for service of process. Id. at 696. The issue was whether service of process to a foreign corporation's involuntary agent was compatible with the Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. Id. Volkswagenwerk does not address vicarious liability of a subsidiary for the acts of the principal and is therefore factually distinguishable from this case.

the realization that injury will result. Id. In his complaint, Plaintiff alleges that "Clive Standish, UBS AG Bank Head Office, and all the rest of the above captioned- named defendants were the legal (proximate) cause of damages..." (Doc. 1-2, Notice of Removal, Exhibit A, Complaint, p. 36, Filed May 6, 2007.) Plaintiff claims that he has suffered "sleepless nights, headaches, causing his blood pressure to rise, loss of appetite, mental anguish, mental or emotional distress, humiliation, and other psychological damage, whenever he thinks of this fraudulent case..." (Id.) While Plaintiff does alleged that the "above captioned-named" Defendants were the cause of his damages, Plaintiff does not allege any specific conduct on the part of UBS FS that caused such damages. Further, even if it were inferred from the complaint that Plaintiff is arguing UBS FS somehow engaged in material misrepresentations towards Plaintiff, he has failed to show how such conduct is so extreme or outrageous that it exceeds all bounds of conduct usually

tolerated in a civilized community. Plaintiff has failed to state a claim against UBS FS for intentional infliction of emotional distress or any other intentional tort he alleges. Defendants' motion to dismiss UBS FS from the complaint is GRANTED WITH LEAVE TO AMEND.

6. PLAINTIFF'S MOTION TO STRIKE

Along with his opposition to Defendants' motion to dismiss, Plaintiff files a motion to strike Defendants'

answer and motion to dismiss. Fed. R. Civ. P. 12(f) provides that "redundant, immaterial, impertinent, or scandalous matters" may be "stricken from any pleading." Fed. R. Civ. P. 12(f). "[O]nly pleadings are subject to motions to strike." See Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983). However, a "motion to strike" materials that are not part of the pleadings may be regarded as an "invitation" by the movant "to consider whether [proffered material] may properly be relied upon."United States v. Crisp, 190 F.R.D. 546, 551 (E.D. Cal. 1999) (quoting Monroe v. Board of Educ., 65 F.R.D. 641, 645 (D. Conn. 1975).

Motions to strike are disfavored and infrequently granted. See Pease & Curran Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 947 (C.D. Cal. 1990), abrogated on other grounds by Stanton Road Ass'n v. Lohrey Enters., 984 F.2d 1015 (9th Cir. 1993). "[M]otions to strike should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation. Colaprico v. Sun Microsystems, Inc., 758 F. Supp. 1335, 1339 (N.D. Cal. 1991)

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(citation omitted). Plaintiff makes the same arguments in his motion to strike as his motion for remand. Plaintiff argues that Defendants' motion to dismiss and answer should be stricken because removal of the action is a denial of due process and free access to the courts. This is nonsense. Removal is a procedure enacted by the Congress of the United States for the preservation of federal jurisdiction 28

U.S.C. § 1441, et. seq. Plaintiff also argues that there is "a lack of jurisdiction by the court." Plaintiff reasons that since the Court lacks authority, it cannot accept for filling Defendants' motion to dismiss and answer, and therefore should strike them out of the record.

This case has been properly removed based on diversity jurisdiction of the parties. Plaintiff fails to provide any support in law or fact that warrants this court striking Defendants motion to dismiss or answer.

Plaintiff's motion to strike is DENIED.

7. CONCLUSION

Plaintiff's motion for remand is DENIED.

Defendants' motion to dismiss UBS FS from the complaint is GRANTED WITH LEAVE TO AMEND.

Plaintiff's motion to strike is DENIED.

DATED: 6/8/2007

/s/ Oliver W. Wanger
United States District Judge
Oliver W. Wanger

5. EXCERPT OF PAGE 7, DOCKET 101:

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render default judgment on UBS AG,Zrich, Switzerland Headquarters and Manhattan, New York Branch)" ... on the ground
that the named defendants failed to answer the complaint within the number of days required under Rule 81(c)" and on the ground that UBS AG's Answer raised non-meritorious defenses. On October19, 2007, UBS AG filed an opposition to this motion, addressing these grounds. (Doc. 64).

Plaintiff did not assert that Defendant did not make an initial disclosure of Annex 15 and 16 of the amended complaint until November 13, 2007. Plaintiff's assertion that UBS FS committed fraud, misrepresentation, and misconduct as detailed in Doc. 93, refers to arguments and assertions made by Plaintiff in
his reply brief in support of Plaintiff's motion to set aside the order dismissing UBS FS and to enter a default against UBS FS filed on January 25, 2008 (Doc. 93).

These two assertions in support of the second motion for default judgment against UBS AG are procedurally improper. The Court will not consider grounds for relief raised for the first time after the opposing party has filed an opposition. Further, there is no basis for a default sanction or any sanction against UBS FS because it has been dismissed from and is no longer a party to this action.

With regard to Annex 15 and 16, Doc. 77 asserts:

> At the joint scheduling conference held on June 19, 2007, plaintiff demanded a copy of Exh. 16, since it originated from UBS AG, together with Exh. 15, the payment order xxxx

6. Case 1:07-cv-00367-OWW-GSA Document 126 Filed 07/15/2008 Page 1 of 8 , order denying motion to remand (second motion)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

CARL L. JIMENA,
Plaintiff,
vs.
UBS AG BANK, INC., et al.,
Defendant.

No. CV-F-07-367 OWW/GSA

MEMORANDUM DECISION AND ORDER DENYING PLAINTIFF'S MOTION FOR REMAND (Doc. 103)

The Notice of Removal in this action asserted removal on the basis of diversity of citizenship:

> 4. Defendant UBS AG is and at all relevant times was a foreign corporation with its place of incorporation and its principal place of business in Switzerland. Defendant UBS Financial Services is and at all relevant times was a corporation with its place of incorporation in Delaware and its principal place of business in New York. Although Plaintiff's Complaint refers to 'UBS AG Bank, Inc., Zurich Switzerland Headquarter,' 'UBS AG Bank, Inc., Manhattan New York Branch,' 'UBS Financial Services, Inc., Bakersfield California Branch,' and 'UBS Financial

Services, Inc., Weehawken New Jersey Branch,' these are branch office locations with no

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jural existence. Accordingly, these entities can neither sue nor be sued. For purposes of determining diversity, a corporation is deemed to be a citizen only of the place of its incorporation and its principal place of business, not of a state where it has a branch office. Wachovia Bank v. Schmidt, 126 S.Ct. 941, 951 (2006). Defendant Clive Standish is and at all relevant times was a citizen of the United Kingdom. There is thus complete diversity among the parties to the case. See 28 U.S.C. §§ 1332(a) and 1441(a).

After removal, Defendants filed a motion to dismiss the Complaint against Defendant UBS FS and Plaintiff filed a motion to declare removal void, deemed by the Court to be a motion to remand. By Memorandum Decision and Order filed on June 6, 2007, the Complaint was dismissed as against UBS FS with leave to amend and Plaintiff's deemed motion to remand was denied. (Doc. 16). In denying the remand motion, the June 6, 2007 Order ruled in pertinent part: Plaintiff next argues that removal was improper because it destroys diversity jurisdiction. Jurisdiction in this case is based exclusively on diversity of citizenship. Original diversity jurisdiction exists under 28 U.S.C. § 1332(a) when the parties are of diverse citizenship and the amount in controversy exceeds $75,000. A

defendant may remove from state court any action 'of which the district courts of the United States have original jurisdiction.' 28 U.S.C. § 1441(a). When an action is removed based on diversity, complete diversity must exist at removal. Gould v. Mutual Life Ins. Co. of New York, 790 F.2d 769, 773 (9 Cir.1986), cert. denied, 479 U.S. 987 ... (1986). Complete diversity requires each plaintiff to be a citizen of a different state from each defendant. Caterpillar Inc. v. Lewis, 519 U.S. 61, 68 (1996); Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9 Cir.2001). Generally,

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diversity is determined from the face of a complaint. Gould, id., 790 F.2d at 773. Plaintiff is a resident of Bakersfield, California. UBS AG is incorporated and has its principal place of business in Switzerland. UBS FS is incorporated in Delaware and has its principal place of business in Weehawken, New Jersey. (Doc. 11, King Declaration.) UBS FS Bakersfield is not a separate corporation. There is no such entity. UBS FS Bakersfield is one of many satellite locations at which the Delaware/New Jersey corporation UBS FS does business. Plaintiff's ignorance of the law does not make it otherwise. Removal in this action did not destroy diversity among the parties and was properly filed by Defendants.

On June 14, 2008, Defendants lodged a proposed Order dismissing UBS FS and ordering Plaintiff to file an amended complaint within 15 days (Doc. 19). On June 19, 2007, Plaintiff filed a Notice of Appeal

to the Ninth Circuit, purporting to appeal the June 8, 2007 Memorandum Decision (Doc. 27). On September 24, 2007, Plaintiff's appeal was dismissed by the Ninth Circuit for lack of appellate jurisdiction. (Docs. 61-62). On October 31, 2007, Plaintiff filed a "Motion to Set Aside Order Dismissing With Leave to Amend UBS FS and To Enter Default Against UBS FS", noticing the motion for hearing on December 3, 2007 (Doc. 68).

By Order filed on November 9, 2007, Plaintiff was ordered to appear on January 7, 2008 and show cause why this action should not be dismissed for Plaintiff's failure to file an amended complaint as required by the June 8, 2007 Memorandum Decision (Doc. 70). Plaintiff filed a written response to this OSC, (Doc.

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82), in which he asserted:

Defendants in this case contended that UBS FS has no wrong doing. The Court found that UBS FS has no wrong doing. Plaintiff agrees with the Court that UBS FS committed no wrong doing. Plaintiff admits UBS FS committed no wrong doing. Plaintiff by agreeing and admitting that UBS FS committed no wrong doing means there are no facts of wrong doing by UBS FS that could be alleged in the complaint by way of amendment. The facts of any wrong doing by UBS FS are none-existent [sic] in this case. It is therefore impossible to amend the complaint against allege in the complaint against UBS FS by way of amendment.

Plaintiff's instant motion to remand is based on his contention, asserted in his reply brief in support of his "Motion to Set Aside Order Dismissing With Leave to Amend UBS FS and To Enter Default Against UBS FS", (Doc. 68), that UBS FS is an agent of UBS AG or an alter ego of UBS AG. Because of these assertions, Plaintiff contends, there is no diversity jurisdiction:

> Treating UBS AG and UBS FS as two separate corporations without application of agency or alter ego doctrines, there are two diverse citizenship [sic]. Now applying the alter ego doctrine, the citizenship of UBS AG is attributed to UBS FS, both has [sic] only one citizenship defeating or destroying diversity ... Applying the agency doctrine, UBS AG and UBS FS are treated as one corporation since their separateness is disregarded, destroying diversity.

Plaintiff's assertion that the theories of agency and alter ego, if allowed to proceed, destroy complete diversity in this action is without merit. For a case to qualify for federal

> Case 1:07-cv-00367-OWW-GSA Document 126 Filed 07/15/2008 Page 5 of 8

jurisdiction under 28 U.S.C. § 1332(a), there must be complete diversity of citizenship between the parties opposed in interest. Kuntz v. Lamar Corp., 385 F.3d 1177, 1181 (9 Cir.2004), citing Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267, 2 L.Ed. 435 (1806). "Diversity jurisdiction under § 1332 requires complete diversity of citizenship, each of the plaintiffs must be a citizen of a different state than

each of the defendants." Allstate Ins. Co. v. Hughes, 358 F.3d 1089, 1095 (9 Cir.2004). Even if assumed for argument purposes, without admitting, that UBS FS may be liable for the actions or inactions of UBS AG on either an agency theory or an alter ego theory, Plaintiff remains a resident/citizen of California and all Defendants remain residents/citizens of a state, states or countries other than California. Plaintiff's reliance on Danjaq, S.A. v. Pathe Communications Corporation, 979 F.2d 772 (9 Cir.1992), S & R Davis Intern., Inc. v. The Republic of Yemen, 218 F.3d 1292 (11th Cir.2000), and American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586 (9 Cir.1996), does not alter this conclusion.

Plaintiff's motion to remand is DENIED.

In his reply brief, Plaintiff requests that the "order denying plaintiff's motion to remand be certified for appeal which means that the certification is to the effect that in the Court's opinion the order is appealable in view of the conflicts of opinion in this case."

28 U.S.C. § 1292(b) provides:

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>
> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of

> Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Section 1292(b) is to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation. United States Rubber Co. v. Wright, 359 F.2d 784, 785 (9 Cir.1966). Plaintiff must demonstrate that (1) there is a controlling question of law; (2) that there are substantial grounds for difference of opinion; and (3) that an immediate appeal may materially advance the ultimate termination of the litigation. In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9 Cir.1982).

Plaintiff has not made the required showing. There is no controlling question of law. Further, "a substantial ground for difference of opinion" requires more than disagreement with a Court's ruling; the term refers to a legal standard applied in the decision for which certification is sought and whether other courts have substantially differed in applying that standard.

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See Harter v. GAF Corp., 150 F.R.D. 502, 518 (D.N.J.1993). Here, Plaintiff simply does not

understand the law governing complete diversity of citizenship.

Rule 54(b), Federal Rules of Civil Procedure, provides:

> When an action presents more than one claim for relief ... or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

In certifying an appeal pursuant to Rule 54(b), the district court must first determine that it has rendered a "final judgment," i.e., a judgment that is "'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 7 (1980).

Plaintiff has not satisfied the requirements of Rule54(b). There is no final judgment of any kind made in connection with the denial of a motion to remand.[10]

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[10] In a pleading filed on June 18, 2008, (Doc. 120), Plaintiff requests that if the Court declines to certify the denial of the motion to remand for immediate appeal, that the Court include in the Order: "Plaintiff may proceed with his appeal if he wishes to

Case 1:07-cv-00367-OWW-GSA Document 126 Filed 07/15/2008 Page 8 of 8

Plaintiff's request for certification of immediate appeal is DENIED.

IT IS SO ORDERED.

Dated: July 14, 2008
/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

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do so." Whether Plaintiff wishes to file an appeal is entirely up to him; the Court can not even impliedly sanction such a proceeding. Plaintiff is advised, however, that the continued filing of appeals of non-appealable orders may subject him to sanctions by the Court of Appeals.

7. EXCERPT FROM DOCKET 125, PAGE 17:order denying motion for reconsideration Doc. 107
Case 1:07-cv-00367-OWW-GSA Document 125 Filed 07/15/2008 Page 17 of 21

> disclosure, then the Court can sanction UBS AG with an entry of default for failing to come up with any evidence to counter plaintiff's documents on initial disclosure.

Plaintiff's motion was not a motion to compel discovery. Further, as stated in the February 27, 2008 Order, there has been no scheduling conference as yet in this action and there is no operative complaint before the Court. The Court will not exercise its discretion to impose a terminating sanction upon a

Plaintiff seeks reconsideration of the ruling in the February 27, 2008 Order that "there is no basis for a default sanction or any sanction against UBS FS because it has been dismissed from and is no longer a party to this action." Plaintiff contends that this ruling "is obiter dictum and is not contained in the dispositive part of the order or judgment." Plaintiff notes that his "Motion to Set Aside Order Dismissing With Leave to Amend UBS FS and To Enter Default Against UBS FS", (Doc. 68), is pending. Plaintiff insists that, because the Order dismissing UBS FS is not a final order, UBS FS remains a party to this action.

Plaintiff's position is legally incorrect. Unless and until Plaintiff's "Motion to Set Aside Order Dismissing With Leave to Amend UBS FS and To Enter Default Against UBS FS", (Doc. 68), is -

resolved in Plaintiff's favor, UBS FS is not a party to this action. There is no basis to impose the sanction of default judgment against UBS FS at this juncture.

8. Case 1:07-cv-00367-OWW-GSA Doc. 133, Notice of Appeal Filed 07/28/2008 Page 1 of 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CARL L. JIMENA,
Plaintiff,

v. Civil Case .No. 07CV367
[1:07-CV-00367 OWW TAG]

UBS AG BANK, INC., SWITZERLAND HEADQUARTERS; UBS AG BANK, INC., MANHATTAN, NEW YORK BRANCH; UBS FINANCIAL SERVICES, INC., BAKERSFIELD, CALIFORNIA BRANCH; AND UBS FINANCIAL SERVICES, INC. WEEHAWKEN, NEW JERSEY BRANCH; CLIVE STANDISH,
Defendants.

NOTICE OF APPEAL

CARL L. JIMENA, Plaintiff and Appellant in the above-entitled case hereby appeals to the U.S. COURT OF APPEALS, Ninth Circuit, located either in 125 South Grand Ave., Pasadena, CA 91105 or 95 Seventh Street, San Francisco, CA 94103, from the Order Doc. No. 126 (denying motion for remand. Doc. No. 103 entered on July 15, 2008, likewise joining

Doc. No. 126 are plaintiff's appeals on all of the following Orders: hereby appeal Doc. No. 18 (order denying plaintiff's motion to declare notice of removal void'[/]remand entered on June 8, 2007 now final) hereby appeals Doc. No. 124 (order denying plaintiff's motion to set aside order dismissing with leave to amend UBS FS and to enter default against UBS FS Doc. No. 68 entered on July 15, 2008; hereby appeals Doc. 98 (order denying Doc. No. 94 plaintiff's motion to set for hearing Doc. No. 80, 77, 78, and 49 entered on June 8, 2008, motion for reconsideration on Doc. 98 denied by Doc. 101; hereby appeals Doc. No. 101 (order denying Doc. No. 99 motion for reconsideration of Doc. No. 98, and denying Doc. No. 49 second amended motion for entry of default and default judgment by the Court entered on February 27, 2008; hereby appeals Doc. No. 125 (order denying Doc. No. 107 plaintiff's motion for reconsideration of order Doc. No. 101 denying motion for reconsideration, entered on July 15, 2008) all rendered by the U.S. District Court in this case and the said Appellant prays that the reviewing Court reverse said appealed ORDERS enumerated above.

Inasmuch as appeal on Doc. No. 126 is a review de novo, the entire records of this case is open for review. [The case of Bishop v. Bechtel Power Corporation (Estate of Bishop), 905 F.2d 1272, 1274 (9th Cir. 1990) stating that denial of a motion to remand is not final or appealable order under 28 U.S.C. §1291 was overruled by the case of Lincoln Property Co. v. Roche 546 U.S. 81 in relation to Roche v. Lincoln Property Co., 373 F.3d 610 (4th Cir. 2004, case no. 03-2064) and by the case of Ramirez v. Fox Television Station, Inc. 998 F.2d 743, 747 (9th Cir. 1993).

Plaintiff hereby encloses Washington Mutual Bank Check No. 4425 for $455.00 in payment of the appeal fee.

Case 1:07-cv-00367-OWW-GSA Doc. 133, Notice of Appeal Filed 07/28/2008 Page 2 of 2

TO THE HONORABLE PRESIDING JUSTICE OF THE NINTH CIRCUIT COURT OF APPEALS: In view of the large amount involved in this case, $38 million dollars or more, plaintiff request that this case be assigned to three strictly neutral Justices (or if permissible, be decided in banc) with no ties whatsoever to the law firm of Munger, Tolles & Olson to insure fairness.

Dated: July 24, 2008

/S/ CARL L. JIMENA
Appellant, In Propia Persona

9. EXCERPT FROM DOCKET 15, PAGE 7, REPLY TO RESPONSE TO MOTION TO DECLARE NOTICE OF REMOVAL VOID

CASE 1:07-CV-00367-OWW-GSA DOCUMENT 15 FILED 04/24/2007 PAGE 7 OF 11

With respect to plaintiff's second contention, defendants attempted to refute it by asserting that service under CCP §415.40 IS "deemed complete on the 10th day after such mailing" and that plaintiff's service is complete on February 10, 2007. This argument of defendants is the same argument raised before the California Supreme Court and was rejected in the case of Johnson & Johnson v .Superior Court (1985) 38 Cal 3d 243, 250. Under

§415.40 service is complete and effective on the date of mailing, not on tenth day after mailing. To quote the Supreme Court:

> "As a final alternative, petitioner argues on the basis of the language just quoted that service is not effected until 10 days after the summons is mailed. However, as quoted above, the language is properly interpreted as making service effective on the date of mailing of mailing while permitting a 10 day grace period before the time for the defendant to answer begins to run" (at page 250)

Applying the above rule to this case, service on UBS AG and UBS FS was effective and complete on July 31,2007 [error is January 31, 2007] when summons and complaint was mailed by certified mail with return receipt requested which was signed on February 2, 2007. Hence the 30 days for removal must be counted from July 31, 2007 [error January 31, 2007], not on February 10 as defendants argue. We should bear in mind that removal statutes are strictly construed. (Cellport Sys. V. Peiker Acustic GmbH & Co. KG [2004, DC Colo 335 F.Supp 2d 1131, 1133) and there are no period of graces in strict construction standard. Therefore, counting 30 days from July 31, 2007, ends up on March 2, 2007. [obviously an error] The notice of removal was filed out of time on March 6, 2007. There is no other choice in this case but for the Court to remand this case to the Superior Court. [Please note: the date July 31, 2007 is an error. Bracketed dates is a correction by petitioner to conform to the record. The correct date of mailing of summons and complaint on UBS AG Manhattan and UBS FS Weehawken, New Jersey on record was January 31, 2007. See Doc. 18,

page 5, line 21-25, Appendix, p. 9 and Doc. 18, p. 7, line 10-13. Appendix, p. 11, 44- 46

10. EXCERPT FROM DOCKET 1, PAGES 5-6, AMENDED COMPLAINT, CASE 1:07-CV-00367-OWW-GSA FILED 01/11/2007

UBS AG Bank Inc. has its center of operation and nerve control center at Bahnhofstrasse 45, Zurich, Switzerland as shown by its website in the internet attached as Annex 1. The latter exhibit shows that the executive staff, board of directors are located in the same address where control comes from to all its branches and 69,000 employees around the world. The same website shows that the center of operation is at the same address where banking, financing and wealth management takes place. as it advertises.

UBS AG Bank, Inc. 101 Park Avenue, Manhattan, New York 10178 and UBS Financial Services, Inc. 1200 Harbor Boulevard, Weehawken, New Jersey 07086 are both joined as defendants to facilitate collection and assist in obtaining relief for the plaintiff and based on the fact that liability of the head office UBS AG Bank Inc. is a liability of all its branches being part of the same corporation.

UBS Financial Services, Inc. 10000 Stockdale Highway, 1 Riverwalk, Suite 270, Bakersfield, California 93311 is joined as defendant for doing business in behalf of or together with its parent corporation UBS AG Bank Inc. headquartered in the above address at Zurich, Switzerland

11. Case 1:07-cv-00367-OWW-GSA Document 33 Filed 07/06/2007 Page 4 of 11, Joint Scheduling Report

(1)*Summary of the factual and legal contentions set forth in the pleadings of each party, including the relief sought by any party presently before the Court.*

Plaintiff contends that he was contacted by an individual who had set up email acffcounts under the name clive standish@yahoo.com and customerservices@privateclientsub'ss.cjb.net, claiming to be Clive Standish, the Chief Financial Officer of UBS AG. Plaintiff contends that this individual offered to transfer to plaintiff's bank account $19 million and convinced plaintiff o wire $51,000 via 'Washington Mutual Bank, Bank of New York, and UBS AGto an account at a fourth bank, HSBC, to satisfy a non-existent "Anti-Drug/Terrorist Clearance" fee required for transfers fro Nigeria;. Plaintiff also contends that $19 million was wired in plaintiff's name to UBS AG from "Standard Trust Bank PLC," a Nigerian banik and that UBS AG is still in possession of these funds. Plaintiff now sues UBS AG and Clive Standish, alleging fraud, "intentional tort," "interest on damages," and violations of several provisions of the California Commercial Code. Plaintiff seeks in excess of $19 million in damages, as well as an additional $19 million in punitive damages.

UBS AG contends that $19 million was never wired to it from Standard Trust Bank PLC., and that the emails plaintiff claims to have received were not from the real Clive Standish, CFO of UBS AG. xxxx

Plaintiff has stated his intention not to amend his pleadings (underlining petitioner's)xxxx

12. Declaration of Jay B. Ericsson attached to Docket ll, District Court, memorandum response to Doc. 8, motion to declare notice of removal void

DECLARATION OF JAY B. ERICSS

I, JAY B. ERICSSON, declare as follows:

I make this declaration ofr my personal knowledge. If called as a witness, I could and would testify competently to the facts stated herein.

2 Since July 2006, I have been employed by UBS Financial Services Inc. ("UBS FS") a securities brokerage firm formerly known as Paine Webber Incorporated. UBS FS' headquarters offices are located in Weehawken, New Jersey.

3. I am the Branch manager of UBS FS Bakersfield office. Bakersfield office consists of five licensed stockbrokers and a support staff. The Bakersfield office is what is known in the securities business as a "satellite" office: a smaller office that reports to a larger branch office, in our case UBS FS Fresno branch office. I report to the manager of the Fresno office, Robert Gunning.

4. My responsibilities and authority at UBS FS are limited to the management (under the supervision of the Fresno office) of the Bakersfield satellite branch office. I have no management responsibilities or authority with respect to any other office, or any other aspect of the business of UBS FS. I am not the president or other head of UBS FS, a vice-president, secretary or assistant secretary, a treaaurer or assistant treasurer, or a general manager, of UBS FS. UBS FS has notg authorized me to receive service of process on behalf of the corporation.

I am not employed in any capacity by UBS AG, and have never been authorized to adct as its agent for any purpose, including service of process.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Bakersfield, California, on April 13, 2007.

/s/ JAY B. ERICSSON

13. ANNEX 3, (Remarked as Exhibit 3) AMENDED COMPLAINT, Doc. 1, District Court, UBS admission UBS FS is its registered broker

UBS (graphics omitted)

Our Company market Info Our Research Careers Find a Financial A UBS

Homepage>wealth>Management US >Our Company

OUR COMPANY UBS AG is a leading global financial services firm serving a diverse client base that includes affluent individuals, corporations, institutions and governments. By integrating and leveraging the combined resources, expertise and best practices of its business units, UBS offers products and services designed to provide appropriate solutions to its clients, regardless of where they are located. From our investment banking strength to our asset management services, our Financial Advisors have at their command a broad array of financial resources to help clients manage their wealth.

UBS is the world's leading provider of private banking services and one of the largest asset managers globally. UBS boasts: • Market capitalization of over $100 billion

• Investment assets of over $2 trillion •

Over 69,000 employees worldwide Wealth Management services in the United States are provided by UBS Financial Services Inc., a registered broker/dealer offering securities, trading, brokerage and related products or services.

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14. PROOF OF SERVICE OF SUMMONS AND AMENDED COMPLAINT TO UBS FINANCIAL SERVICES, INC., WEEHAWKEN, NEW JERSEY HEADQUARTERS AND BRANCH FILED 01/31/2007 SUPERIOR COURT OF CALIFORNIA CASE NO. S1500CV59605; AFTER REMOVAL BECAME Case 1:07-cv-00367-OWW-GSA, DIST. C.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF KERN, 1415 Truxton St., Bakersfield, CA 93301, Case No. S1500CV59605

PROOF OF SERVICE OF SUMMONS

1. At the time of service I was at least 18 years of age and not a party to this action.

2. I served copies of

a. Summons (two copies: one for the branch [3a] below; one for UBS AG Bank, Inc., Zurich, Switzerland Headquarters [6d] below)

b. not applicable

c. Not applicable

d. Civil Case Coveer Sheet

e. not applicable

f. Other: amended complaint (two copies: one for the branch [3a] below, one for UBS AG Bank, Inc. Zurich, Switzerland Headquarters [6d] below

3. a. Party served: Ubs Financial Services Inc., Weehawken, New Jersey Branch

b. Person (other than the party in item 3a) served on behalf of an entity or as an authorized agent (not a person under item 5b or on whom substituted service was made) (specify name and relationship to the party named in item 3a)

President/General Manager/Legal Department and Edmund Shea, agent for service of process, in behalf of UBS Financial Services, Inc., Weehawken, New Jersey Branch and in behalf of UBS AG Bank, Inc., Zurich, Switzerland Headquarters as involuntary agent (Schlund[k] case 486 U.S. 694 (1988)

4. .Address where the party was served; 1200 Harbor Boulevard, Weehawken, New Jersey 07086

5. I served the party

a. not applicable

b. not applicable

c. not applicable

d. by other means (specify means of service and authorizing code section): Sec. 415.40 By certified airmail return receipt requested mailed on 1-31-07 at Mojave Post Office, addressed to no. 4 above to the person no. 3a & 3b above, certified airmail receipt requested.

6. The "Notice to the Person Served" (on the summons) was completed as follows:

a. not applicable

b. not applicable

c. not applicable

d. On behalf of (specify): under the following Code of Civil Procedure section:

416.10 (corporation) UBS Financial Service Inc., Weehawken, New Jersey Branch

Other: in behalf of UBS AG Bank Inc., Zurich, Switzerland, Headquarters as involuntary agaent (Schlund[k] case 486 U.S. 694 (1988)

7. Person who served papers
a. Name: Dawn Misso
b. Address: 15825 "K" Street, Mojave, CA 93501 c. Telephone number: 661-824-4126

d. The fee for service was $10.00

e. I am not a registered California process server.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 1/31/07

Dawn Misso /s/ Dawn Misso

Name of the person who served the papers

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
In Re: CARL L. JIME NA
Petitioner

On Petition for Writ of Mandamus To
The Court of Appeals For The Ninth Circuit
(San Francisco, California Division)

Certificate of Mandamus Petition's Number of Words

I, CARL L. JIMENA, petitioner pro se in this case, do hereby certify that the number of words in the instant petition is 6,409 as counted by the Microsoft Word Program 2007 excluding questions presented, list of parties, table of contents, table of cited authorities, appendix and the rest of the matters excluded in Rule 33(d), Supreme Court Rules.

I declare under penalty of perjury under U.S. federal laws that the above is true and correct.

Dated: 2-23-09

Carl L. Jimena
Petitioner, Pro Se

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

In Re: CARL L. JIME NA

Petitioner

On Petition for Writ of Mandamus To
The Court of Appeals for The Ninth Circuit
(San Francisco, California Division)

Proof of Service of Mandamus Petition

I, Carl L. Jimena declare: I am not less than 18 years of age and a party to the within case. I served the "PETITION FOR WRIT OF MANDFAMUS" in the above-entitled case by first class United States certified airmail with return receipt requested, postage prepaid at the Post Office in California City California on February 23, 2009 and addressed to the respondents as follows:

1. Court of Appeals, 9th Circuit, San Francisco, CA Division, c/o Clerk of Court for delivery to: Hon. Harry Pregerson, Hon. M. Margaret Mckeon, Hon. N.R. Smith
   Address: 95 Seventh Street, San Francisco, CA 94103; (5 copies)
2. Hon Oliver W. Wanger, Presiding Judge
   U.S. District Court, Eastern District of California
   Address: 2500 Tulare St., Court Room 3, Fresno, CA 93721 (2 copies)
3. Atty. Jacob S. Kreilkamp of Munger,Tolles & Olson, 355 South Grand Ave. 35th Floor, Los Angeles, CA 90071-1560, (2 copies)
   Counsel for UBS AG and UBS FS

I declare under penalty of perjury under U.S. federal laws that the above is true and correct.

Dated: 2-23-09

Carl L. Jimena
Petitioner, Pro Se